IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1644

In the Matter of the Claim for Benefits under Article 18 of the Labor Law made by BERTRAM M. DRASSENOWER, WILLIAM SLOMINSKY, WALTER EHRENPREIS, JOHN A. PODRASKY, LAWRENCE ALDOUS, MARIO L. ECHEMENDIA, ALFRED DOVE, ANGELO ENDRIZZI, ENOS E. FRANCIS, VINCENT HARRIGAN, CURTIS LEGRAND, STEPHEN ONDOCIN, LUCY MEAD, LOUIS V. LAURA, JOHN T. KEYS, FELIX A. SEDA, JOHN P. CESTOLA, JOSEPH A. POGGIOREALE, ANTHONY J. MARS' A, EUGENE M. MCKENNA,

Petitioners,

against

LOUIS J. LEVINE, as Industrial Commissioner,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Respondent opposes the petition for a writ of certiorari to review an order of the New York Court of Appeals dated December 2, 1975, affirming a judgment of the Supreme Court of the State of New York, Appellate Division, Third Department dated April 14, 1975.

Opinions Below

The opinion and the order of the Court of Appeals, 38 N Y 2d 771 (1975), appear in petitioners' Appendix A. This order was entered *sub nom. In the Matter of the Claim for Benefits &c. made by Bertram M. Drassenower (Lead Case, et al., Appellants* v. *Louis L. Levine, as Industrial Commissioner, Respondent).*

On June 23, 1975, an order was entered by the Appellate Division of the New York Supreme Court (petitioners' Appendix C) upon its opinion in this case rendered on June 12, 1975. Said opinion reported *sub nom. In the Matter of The Claim for Benefits under Article 18 of the Labor Law made by Bertram Drassenower (Lead Case), et al., Appellants* v. *Louis L. Levine, as Industrial Commissioner, Respondent* appears as petitioners' Appendix D and has been reported at 48 A D 2d 957, 369 N.Y.S. 2d 227 (3d Dept., 1975). An opinion rendered by the Unemployment Insurance Appeal Board of the New York State Department of Labor on July 30, 1974 and unreported, appears as petitioners' Appendix E. The prior opinion rendered by a Referee in the Unemployment Insurance Referee Section, New York State Department of Labor on February 25, 1974, and unreported, appears as petitioners' Appendix F.

Jurisdiction

The order and decision of the New York Court of Appeals was dated and entered on December 2, 1975. Petitioners seek to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3).

Questions Presented

1. Was the petition timely filed?

2. Have petitioners' claims been foreclosed by prior decisions of this Court?

Statement of the Case

Petitioners are members of the International Association of Machinists employed by Trans-World Airlines. On November 5, 1973, flight attendants represented by Airline Stewards and Stewardesses Association of the Transport Workers Union of America went on strike as a result of which petitioners were laid-off. The strike ended December 18, 1973. A local office of the New York Industrial Commissioner, a New York Unemployment Insurance Referee and the Unemployment Insurance Appeal Board of New York found that petitioners lost their employment because of an industrial controversy in the establishment in which they were employed and were thus subject to a suspension of unemployment insurance benefits for seven weeks as specifically provided in the New York Labor Law, § 592.1.

The decision of the Appeal Board was upheld by the Supreme Court of the State of New York, Appellate Division, Third Department. Petitioners' appeal to the New York Court of Appeals was dismissed for want of a substantial constitutional question. Petitioners' subsequent motion for leave to appeal to the Court of Appeals was denied.

Reasons for Denying the Petition for Certiorari

I.

The petition was not timely filed.

Pursuant to 28 U.S.C. § 2101(c), a petition for certiorari must be filed within ninety days after entry of the judgment of the State Court of last resort. Failure to file

within that period is jurisdictional and the petition must be denied for want of jurisdiction. *Department of Banking* v. *Pink,* 317 U.S. 264 (1942).

The ninety day period in the case at bar must be counted from December 2, 1975, the date the New York Court of Appeals dismissed petitioners' appeal to that court "upon the ground that no substantial constitutional question is directly involved". (petitioners' Appendix A). Petitioners' gratuitous motion for leave to appeal to the Court of Appeals, which was denied February 12, 1976 (petitioners' Appendix B) does not toll the ninety day period.

Petitioners admit that the order and decision of the Court of Appeals to which this petition is directed is that dated December 2, 1975 (petitioners' Brief, pp. 2-3). Once their appeal as of right, pursuant to New York Civil Practice Law & Rules 5601(b), was dismissed for want of a substantial constitutional question, their motion for leave to appeal pursuant to CPLR 5602(a)(1) was superfluous since it was based essentially on the same grounds as the appeal that was dismissed.* Since the motion for leave to appeal presented no new arguments to the Court of Appeals, it could not and did not affect the final decision of the Court of Appeals, which petitioners seek to have this Court review, and the denial of the motion does not extend the time in which petitioners were required to file their petition for certiorari.

In *Department of Banking* v. *Pink, supra,* this Court held that a motion to amend the remittitur of the New York Court of Appeals which does not seek reargument or rehearing does not extend the time in which to apply for

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* Indeed, in the affirmation of Robert Stephen Cohen in support of their motion for leave to appeal, par. 11, petitioners requested that if leave to appeal be granted they be permitted to submit as their main brief their brief previously submitted on the appeal of right since "[t]he facts and legal issues involved in both appeals are identical . . .".

certiorari. This Court explained that the test for determining whether a particular motion tolls the ninety day period is whether the Court had "in fact fully adjudicated rights and that the adjudication is not subject to further review by a state court" (citation omitted). 317 U.S. at 268.

The decision of December 2, 1975 was final. The Court of Appeals found that petitioners had presented no substantial constitutional question. That decision "plainly and properly settled with finality" *Federal Trade Commission* v. *Honeywell Regulator Co.*, 344 U.S. 206, 212 (1952) petitioners' claims. The motion for leave to appeal, in light of the earlier determination, had and could have had no import on what petitioners would ask this Court to review.

The decision of December 2, 1975 was the "final word of a final court." *Market Street Railway Co.* v. *Railroad Commission of California*, 324 U.S. 598, 551 (1945). The ninety days began to run at that time. Since this petition was filed over two months after the ninety days, it was not timely and must be dismissed for want of jurisdiction.*

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* *American Railway Express Co.* v. *Levee*, 263 U.S. 19, 20 (1923) and *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954) do not hold to the contrary, since there, the time was counted from when the highest state court refused to review a judgment of an intermediate state appellate court. There, unlike here, there would have been no jurisdiction in this Court had the petitioners not applied first to the state's highest court. Here, the first decision was a final decision. Petitioners attempt to present the same claim again does not make the decision of December 2, 1975 less final. Nor can petitioners' motion for leave to appeal be considered a petition for rehearing, see *United States* v. *Healey*, 376 U.S. 75 (1964) since petition for rehearing would, by definition, not be foreclosed by the earlier decision, as was petitioners' motion foreclosed by the first Court of Appeals decision. The Court of Appeals may consider only questions of law. New York Constitution, Art. 6, § 3(a). Having determined that there was no constitutional question, there would be no other question of law for the Court of Appeals to review that would have motivated the Court of Appeals to exercise its discretionary jurisdiction pursuant to the New York Constitution, Art. 6, § 3(b).

II.

Petitioners' claims are foreclosed by prior decisions of this Court.

That petitioners' constitutional claims are without merit is demonstrated by this Court's recent decisions in *Weinberger* v. *Salfi*, 422 U.S. 749 (1975) and *Geduldig* v. *Aiello*, 417 U.S. 484 (1974). In both cases, this Court upheld the right of the government, Federal or State, to exclude from insurance coverage certain groups notwithstanding the otherwise legitimate claims the members of those groups had on receipt of insurance funds.* As in *Weinberger* v. *Salfi*, *supra*, the New York Legislature has determined that "the benefits here are available upon compliance with an objective criterion, one which the Legislature considered to bear a sufficiently close nexus with underlying policy objectives to be used as the test for eligibility". 422 U.S. at 772.

As indicated by the opinion of the Appellate Division, Third Department (petitioners' Appendix D), the New York Labor Law § 592.1 furthers the policy of New York State to stand

> "Aside for a time from labor disputes 'to avoid the imputation that a strike may be financed through unemployment insurance benefits' (*Matter of Burger* [*Corsi*], 277 App. Div. 234, 236 affd. 303 N.Y. 654) and . . . to require employers to subsidize wages lost by those on strike or locked out 'would subvert the delicate balance of power existing between labor and man-

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* The Appellate Division opinion also states: "It is well-settled law that both strikers and non-participating employees are subject to a suspension of unemployment insurance benefits (citing cases). As to the public policy of this State, it is determined by the Legislature and was determined in 1935 by the enactment of the statute in question here, which remains the public policy of this State until such time as the Legislature sees the need for a change (citation omitted)."

agement upon which the collective bargaining process depends' (*Matter of Kelley* [*Catherwood*], 33 A D 2d 830, affd. 29 N Y 877)" Petitioners' appendix A-6-A-7.

As in *Geduldig* v. *Aiello, supra,* the State's under-inclusion of certain risks does not violate the United States Constitution. *Richardson* v. *Belcher,* 404 U.S. 78 (1971).

The decision in *Hodory* v. *Ohio Bureau of Employment Services,* 408 F. Supp. 1016 (N.D. Ohio 1976) (3 JJ Court) (petitioners' Appendix G) appeal filed, 44 U.S.L.W. 3686 provides an insufficient ground for granting the petition. First, the Ohio statute excluded for the entire duration of the labor dispute those employees who applied for unemployment insurance, while the New York statute excludes applicants for only seven weeks. Second, as indicated by *Weinberger* v. *Salfi, supra* and *Geduldig* v. *Aiello, supra, Hodory* was wrongly decided. The Court in *Hodory* merely substituted its judgment for that of the Ohio Legislature. It failed to consider the leeway that this Court has provided the government to determine eligibility requirements for and what groups should be included in public programs of insurance.* The distinction created by the New York Legislature are clearly constitutional.

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* Insofar as there is a conflict between *Hodory* and the New York Court of Appeals, if indeed there is a conflict, it may be resolved by this Court on the direct appeal from the judgment of the District Court for the Northern District of Ohio. Certiorari was denied in a somewhat similar case: *ACUNA* v. *California Unemployment Insurance Appeals Board,* 75-802, cert. den. 44 U.S.L.W. 3531 (March 23, 1970).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York,
July 9, 1976.

Respectfully submitted,

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